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SUPREME COURT, U.S.

In The

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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QUESTIONS ON WHICH SUPPLEMENTAL BRIEFING WAS ORDERED

The Court directed the parties to file supplemental briefs addressing the following questions:

(1) Does authority exist outside the Federal Arbitration Act (FAA) under which a party to litigation begun without reliance on the FAA may enforce a provision for judicial review of an arbitration award?

(2) If such authority does exist, did the parties, in agreeing to arbitrate, rely in whole or part on that authority?

(3) Has petitioner in the course of this litigation waived any reliance on authority outside the FAA for enforcing the judicial review provision of the parties' arbitration agreement?

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INTRODUCTION AND SUMMARY OF ARGUMENT

More than six years ago, the parties in this case entered into an arbitration agreement to resolve disputes then pending in a federal district court. After an arbitrator entered an award in respondent Mattel's favor, respondent applied for confirmation of the award to have the court enter the award as a judgment. Petitioner Hall Street sought to vacate the award and to have the court enter a modified or corrected award in its favor.

During the course of the subsequent district court proceedings, both parties understood respondent's effort to confirm and petitioner's effort to vacate, modify, or correct the award to be governed by the Federal Arbitration Act (FAA), which they interpreted to allow expanded judicial review for errors of law and fact. There was no suggestion that any other authority (federal or state) controlled the proceedings.

After the district court vacated the award for respondent and confirmed a modified award for petitioner, the judgment was appealed. While the appeal was pending, the court of appeals ruled in a different case that parties could not expand the grounds for judicial review under the FAA. Petitioner then attempted to distinguish this case from that new FAA precedent, but the court of appeals reversed, restoring the arbitration award in respondent's favor.

In its petition for a writ of *certiorari* to this Court, petitioner did not suggest that any law other than the FAA was implicated by this case. Indeed, petitioner relied on the fact that the FAA governs

this case to assert that the decision below was in direct conflict with decisions of other circuits, which also had not relied on any authority other than the FAA. It is far too late for petitioner to contend that there is some alternative authority that may give life to the judicial review provision after petitioner has consistently argued that it is the FAA that does so.

Section 9 of the FAA controls this case because the parties agreed to have the arbitrator's award entered as a judgment and that provision is severable from the expanded grounds for judicial review. Only the grounds established by Congress in Sections 10 and 11 can prevent confirmation and entry of judgment under Section 9, and petitioner acknowledges that none of those grounds is applicable here.

In any event, no other authority exists in this diversity case that can support expanded grounds for judicial review of the arbitration award for errors of law and fact. Oregon state law would not enforce such a provision. And there is no authority in either federal statutes or court rules that permits a court to vacate, modify, or correct an arbitration award on grounds other than those identified by the FAA or, when Section 9 does not apply, state law.

ARGUMENT

I. THE ARBITRATION AWARD IN THIS CASE IS SUBJECT TO SECTION 9 OF THE FEDERAL ARBITRATION ACT, AND NO AUTHORITY OUTSIDE THAT ACT EXISTS TO ENFORCE THE PROVISION FOR JUDICIAL REVIEW OF ERRORS OF LAW AND FACT

A. The Parties Agreed To Have The District Court Enter Judgment On The Award Within The Meaning Of Section 9, Which Governs Regardless Of Whether Other Issues Were Resolved Through Litigation

1. Although there was litigation that had begun without reliance on the FAA, that does not alter the fact that the FAA is the basis of the authority of the court designated by the parties to confirm their arbitration award. That authority derives from Section 9 of the FAA, which governs because the parties agreed in their agreement to have judicial entry of the award as a judgment.[1]

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[1] The parties' agreement to arbitrate certain issues (rather than litigate them) met the criteria of Section 2 of the FAA, which specifically provides that a written agreement "to submit to arbitration *an existing controversy* arising out of" a "contract evidencing a transaction involving commerce" is "valid, irrevocable, and enforceable," as a matter of federal substantive law, save upon such grounds as exist in state law "at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The fact that Section 2 governs enforcement of the *agreement to arbitrate* here does not, however, determine what law governs enforcement of the *arbitration award*.

Section 9 was created by Congress to provide a streamlined action for enforcement of arbitration awards under the FAA. Prior to the enactment of the FAA in 1925, common law actions were available to enforce or vacate arbitration awards. Federal courts entertained these actions under federal common law (which governed in diversity cases during the reign of *Swift v. Tyson*, 41 U.S. 1 (1842), as well as in admiralty cases). *See Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) ("If executed—that is, if the [arbitration] award has been made—effect will be given to the award in any appropriate proceeding at law, or in equity."); *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (Story, J.).

By 1925, many States had adopted statutes providing streamlined actions to confirm arbitration awards because common law enforcement was burdensome. At common law in most States, if a party to arbitration refused to comply with the arbitrator's award, the winning party had to rely on full-blown litigation to enforce the award, and the losing party could bring a separate action in equity to vacate the award. John T. Morse, Jr., *The Law of Arbitration and Award* 579-590, 595-596 (1872). And it was unclear whether a court could not just vacate, but modify or correct an award in these actions. *Id.* at 330. The state statutes thus established a single action for confirmation with discrete statutory grounds for vacatur of an award, and also expressly empowered courts to modify or correct awards.

In the FAA, Congress likewise did not leave the parties to rely on common law actions.[2] Instead, Congress created substantive federal actions in Sections 9, 10, and 11 of the FAA.

Congress established in Section 9 a streamlined action to permit parties to have judgment entered by a court on an award. Parties may file applications (treated as motions) instead of complaints, 9 U.S.C. §§ 6, 12, thus precluding the delay and cost associated with filing answers or motions to dismiss. *IFC Interconsult, AG v. Safeguard Int'l Partners, LLC*, 438 F.3d 298, 308 (3d Cir. 2006); Fed. R. Civ. P. 81(a)(3) (rules of civil procedure apply to proceedings under FAA "only to the extent that matters of procedure are not provided for"). Non-FAA counterclaims are not permissible. *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 931-933 (11th Cir. 1990). Rule 16, which governs scheduling conferences and other pre-trial case-management tools, does not apply to such proceedings. *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 108 n.2 (2d Cir.

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[2] In this respect, arbitration under the FAA differs from arbitration pursuant to collective-bargaining agreements. Congress granted the federal courts authority in Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, to create federal common law pertaining to arbitration provisions in such collective-bargaining agreements. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455-458 (1957); Resp. Br. 24 (discussing the *Steelworkers' Trilogy*, which established the grounds for vacating collective-bargaining arbitration awards). Similarly, federal common law governs maritime transactions due to the Constitution's grant of authority to adjudicate cases of admiralty and maritime jurisdiction. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004).

2006); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1257-1258 (7th Cir. 1992). The FAA imposes a short three-month statute of limitations to seek judicial review of an award, 9 U.S.C. § 12, thus bringing a swift answer to the question whether an award will be challenged. In addition, the FAA specifies limited grounds for vacatur, modification, or correction of an award under this action (none of which is the error-of-law ground that petitioner invokes).

2. That streamlined action applied in this case because the parties in their agreement "agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." 9 U.S.C. § 9. Paragraph 24 of the arbitration rules agreed to by the parties, which is entitled "Confirmation of Award by Judgment," states that the parties will submit the award to the district court "for the confirmation of the [arbitrator's] decision as a judgment of such court." Pet. App. 15a. That language is plainly sufficient to meet the Section 9 standard for application of the streamlined confirmation action. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 388-390 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981).[3]

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[3] Our earlier brief on the merits demonstrated that the language in the agreement that sought to expand the power of the court to vacate, modify, or correct the award on grounds not listed in the statute did not contain any express language conditioning the entry of judgment on such review. Pet. App. 15a-16a (¶¶24, 27). The court of appeals unequivocally ruled that the sentences were severable (a question of state law), *id.* at 115a, and after petitioner unsuccessfully petitioned for

(Footnote continued on following page)

In such a case, where a Section 9 application to confirm is made, the only ground for denying confirmation is where "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9. Petitioner repeatedly conceded that its claim of legal error is not a ground for vacating, modifying, or correcting as prescribed in Sections 10 and 11. Pet. Br. 13, 18-19, 20, 28.

B. If Section 9 Of The FAA Had Not Applied Here, Oregon Law Would Have Prevented Enforcement Of The Provision For Judicial Review Of The Award For Errors Of Law And Fact

In a situation where the parties to an arbitration agreement did not agree to have judgment entered upon the award (unlike the instant case, where there was such an agreement), the federal action under Section 9 would not apply. In such a case, the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, requires state law to govern unless "the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." That statute is applicable to the instant case because the underlying litigation between the parties regarding the meaning of the leases was brought by petitioner in state court under Oregon law and was properly removed to federal court solely because of the diversity of the parties.

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rehearing in the court of appeals, it abandoned that issue and did not raise it in its *certiorari* petition or in either of its briefs on the merits to this Court. Resp. Br. 9 n.2, 42.

Oregon law would not enforce a provision in an arbitration agreement permitting vacatur, modification, or correction for legal error or lack of substantial evidence. Instead, Oregon statutory law requires a court to confirm an arbitration award rendered in Oregon and to enter judgment on that award unless one of the enumerated grounds in the statute applies.

1. The Oregon Uniform Arbitration Act of 2003

The Oregon Uniform Arbitration Act (OUAA), OR. REV. STAT. §§ 36.600-36.740, enacted in 2003, currently governs arbitration awards rendered in Oregon. Under the OUAA, once "a party to an arbitration proceeding receives notice of an award," that party may seek confirmation of the award in the court for the county where the arbitration hearing was held. *Id.* §§ 36.700(1), 36.725. That court "shall issue a confirming order," *id.* § 36.700(1), and "shall" enter judgment based on that order, *id.* § 36.715(1), unless a statutory basis for vacatur, modification, or correction exists. The OUAA enumerates eight specific grounds on which an arbitration award may be vacated—the grounds are substantially similar to those allowed under the FAA. Neither error of law nor lack of substantial evidence is among them. *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 949 n.3 (Or. Ct. App. 2007).

The text of the OUAA expressly provides that it will not give effect to any alteration by parties of the grounds for judicial review of an arbitration award beyond the grounds listed in that statute. OR. REV. STAT. § 36.610(3) (parties may not waive or vary effect of grounds listed in sections 36.705 and 36.710

for vacatur, modification, or correction).[4] Consequently, it is clear that once a party seeks confirmation of an award, the OUAA requires confirmation, despite the existence of any legal or factual error, even where the arbitration agreement purports to permit vacatur or modification for such error.

There is some question, however, whether the OUAA would have applied to this case because that statute was enacted in January 2003, after the district court began its initial review of the arbitration award in this case, and the statute has complex effective-date provisions. 2003 Oregon Laws ch. 598, §§ 3, 31; 2005 Oregon Laws ch. 22, § 30. But the same result would have occurred under the OUAA's now-repealed predecessor.

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[4] This express prohibition in the OUAA against varying the grounds for judicial review of an arbitration award is based on the Revised Uniform Arbitration Act, which was adopted by the National Conference of Commissioners on Uniform State Laws in 2000. In the short time since its adoption, that Uniform Act has been enacted into law by twelve States, including five of the nine States located in the Ninth Circuit. National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Arbitration Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited Nov. 27, 2007). Thus, to the extent that the Ninth Circuit's decision in this case could be read to hold that the FAA precludes parties from relying on state laws that would permit different judicial review than that authorized under the FAA, that question has no significance in States such as Oregon and is of rapidly diminishing significance nationwide.

2. The Oregon Arbitration Act

The Oregon Arbitration Act (OAA) was enacted in 1925, *see* 1925 Oregon Laws ch. 186, and applied to an award that was the result of a written arbitration agreement where the award was rendered in Oregon. OR. REV. STAT. § 36.305 (2001); *In re Hilltop Dev. Corp.*, 745 P.2d 1221, 1223 (Or. 1987). Both of these prerequisites were met in this case.

When the OAA originally was enacted, it permitted vacatur or modification of an award for an "error in fact or law." 1925 Oregon Laws ch. 186, § 7(b). But the Oregon legislature amended the statute in 1931 to, *inter alia*, make the grounds for vacatur or modification substantially similar to those in the FAA, and did not materially alter them again. 1931 Oregon Laws ch. 36, § 3; OR. REV. STAT. § 36.355 (2001) (repealed 2004). Under those grounds, "[n]either a mistake of fact or law vitiates an award." *Brewer v. Allstate Ins. Co.*, 436 P.2d 547, 549 (Or. 1968).

The OAA's structure and Oregon case law also demonstrate that a provision to expand the grounds for vacatur, modification, or correction for legal or factual error would not be enforced. Once an arbitration award pursuant to a written arbitration agreement is properly filed with a court clerk, "judgment shall be entered" by that court on the award unless a party files one of the enumerated "exceptions," invoking a specific statutory ground for vacatur, modification, or correction of an award. OR. REV. STAT. § 36.350. Those grounds, defined in section 36.355, are "limited to a number of challenges to the integrity, conduct or procedures of the arbitrators but excluding the merits of the dispute." *Hilltop*, 745 P.2d at 1223.

The absence of judicial authority to deviate from the OAA's requirements even with the consent of the parties is reflected in *Parmenter v. Parmenter*, 828 P.2d 1050 (Or. Ct. App.), *modified*, 841 P.2d 4 (Or. Ct. App. 1992). The trial court in that case confirmed an arbitration award but, pursuant to the parties' stipulation, entered judgment directing one of the partners, rather than a partnership, to pay part of the award. *Ibid.* The court of appeals ruled that, despite the stipulation, the OAA limited the trial court's authority "to entering judgment 'according to the award.'" *Id.* at 1052 (quoting ORS § 36.365). The court of appeals held that "the parties could not" by agreement "give the court authority that it otherwise lacked." *Ibid.* Consequently, where (as here) an arbitration award results from a written agreement to arbitrate in Oregon, the OAA precluded a court from reviewing the award for legal error or lack of substantial evidence, notwithstanding the parties' agreement otherwise.

The OUAA and OAA, when they apply to an award, are the exclusive state law causes of action for confirming or vacating, modifying, or correcting that award in Oregon.[5] Thus, there is no authority

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[5] There is no common-law action available in Oregon in a case such as this because the criteria for confirmation of the award under both the OUAA and OAA were met, and thus the award "shall" be confirmed unless the statutory grounds for vacatur are applicable. When the OAA was in force, however, it "did not replace common law arbitration when the statute [did] not apply" to the award. *Hilltop*, 745 P.2d at 1224 (recognizing common-law action to enforce award derived from oral arbitration agreement). Because of the exclusivity of the expansive statutory action when it applies, it appears that the Oregon courts have not addressed whether, in a confirmation

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under governing state law for the enforcement of the parties' agreement that expanded grounds of review for legal and factual error be applied to vacate, modify, or correct the award.

C. No Federal Case-Management Or Other Authority Permitted The District Court Sitting In Diversity Here To Adopt Grounds For Judicial Review Different From Those In The FAA Or State Law

Neither petitioner nor the lower courts previously have suggested, let alone identified, any federal case-management statute or rule that empowered the district court in this case to adopt grounds for review of the arbitration award distinct from the FAA and state law. *See* Fed. R. Civ. P. 16(c)(9) (authorizing a court to take "appropriate action" with respect to "the use of special procedures to assist in resolving the dispute *when authorized by statute or local rule*") (emphasis added). The absence of such express authority to create federal grounds for reviewing an arbitration award is fatal, particularly in this diversity action.

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action not governed by the OAA or OUAA, judicial review for legal error where the parties so agreed would be permissible under the common law of Oregon.

1. The Relief Petitioner Sought In Its Complaint Excluded This Case From The Alternative Dispute Resolution Act of 1998 Which, In Any Event, Does Not Authorize A Hybrid Scheme Of Arbitration And Expanded Judicial Review Of The Award

1. The Alternative Dispute Resolution Act of 1998 (ADRA), 28 U.S.C. § 651 *et seq.*, authorizes a district court to refer certain civil actions to arbitration and have those awards enforced under a scheme distinct from the FAA. An arbitration award under the ADRA is entered as a judgment of the court unless, within 30 days after the filing of the award, a party files a written demand for a trial *de novo*. *Id.* § 657(a), (c). Upon such a demand for trial *de novo*, the action must be "treated for all purposes as if it had not been referred to arbitration." *Id.* § 657(c)(2).

This case falls squarely within the class of cases in which the ADRA prohibits a court from exercising even that circumscribed authority. The ADRA provides that a district court may not "allow the referral to arbitration" of a civil action under the ADRA even "when the parties consent," where the action is based on an alleged violation of the Constitution, jurisdiction is based on 28 U.S.C. § 1343 (regarding civil rights claims), or "the relief sought consists of money damages in an amount greater than $150,000." *Id.* § 654(a). This case comes within the last of those exclusions because petitioner sought $19.6 million in money damages. J.A. 35 (¶58). By specifically excluding these classes of cases, the ADRA reflects Congress's judgment that federal courts may not refer such cases to arbitration absent some other grant of authority.

In addition, there is nothing in the ADRA that permits the hybrid scheme petitioner invokes in this case, which did not provide for a trial *de novo*, but rather only for judicial review of the award for legal error and substantial evidence. 28 U.S.C. § 651(e) (ADRA "shall not affect title 9, United States Code").

Furthermore, under the ADRA, the arbitrator to whom the case is referred must be "certified" by the district court pursuant to standards established by that court, which must include that the arbitrator take the same oath of office taken by federal judges. *Id.* § 655(b). In light of the clear and specific safeguards for judicial control of such arbitration that Congress provided, and which were not followed in this case, the ADRA cannot serve as authority for the district court's order approving the arbitration agreement in this case.

2. Neither The Federal Rules Of Civil Procedure Nor Local Rules Authorize A Hybrid Scheme Of Arbitration And Expanded Judicial Review Of The Award

There is no authority in the federal rules of civil procedure for this hybrid scheme of arbitration and expanded judicial review of the award. Petitioner made a passing reference in its court of appeals' brief to appointment of a special master under Federal Rule of Civil Procedure 53. But what occurred here cannot be accurately described as a Rule 53 referral to a special master.

Rule 53 requires that a *court* enter an order to appoint a particular individual as a special master and specify the scope of the master's powers and duties. *Id.* at 53(a), (c).[6] In the instant case, the arbitration agreement allowed *the parties* to select the arbitrator and, by stipulation, to modify any of the duties of the arbitrator or the procedures for the arbitration and did not contemplate any direction from the court in that regard. Pet. App. 7a, 16a (¶¶6, 26).

Rule 53(e) permits parties to stipulate that the master's fact findings will be reviewed for clear error or not at all. Rule 53 does not permit the parties to challenge those findings as not "supported by substantial evidence," which is the standard that the parties purported to adopt in this case. Pet. App. 16a (¶27).

No local rule of the District of Oregon district court discusses arbitration or authorizes a hybrid model of arbitration with judicial review for factual and legal error. Oregon Local Rule 16.4 provides that parties "may agree to pursue mediation, or any other form of alternate dispute resolution, at any time in the life of a civil case," but the only orders authorized by the rules are orders directing *mediation* and orders staying proceedings pending alternate dispute resolution. The parties engaged in such court-ordered mediation, but it was unsuccessful and was completed before they entered into the agreement to arbitrate.

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[6] Rule 53 was amended in 2003 to impose additional requirements. We cite in the text the version in effect when the parties agreed to arbitration.

The arbitration agreement here purporting to establish judicial vacatur or modification of an arbitration award pursuant to the FAA based on error of law or lack of substantial evidence was thus entered bereft of any other authorization by federal law or court rule.

II. THE PARTIES RELIED EXCLUSIVELY ON THE FAA IN AGREEING TO ARBITRATION AND TO JUDICIAL REVIEW OF THE AWARD, NOT ON ANY OTHER AUTHORITY

A. The Parties' Arbitration Agreement Demonstrates That They Meant For The Arbitration Award To Be Judicially Reviewed Under The FAA

1. The first discussion of arbitration in the record of this case appears in the parties' Joint Status Report of October 15, 2001. That document, which the parties submitted to the district court shortly after court-ordered mediation failed, reveals that the idea of proceeding to arbitration was initiated by the parties themselves and *not* the district court. J.A. 46. The parties reported that they were seeking to reach an agreement "by which all remaining issues in the case could be resolved through 'contract arbitration.'" *Ibid.* They then relied on a law review article that discusses judicial review of arbitration awards *under the FAA*, including the disagreement among courts as to whether parties could direct the grounds for judicial review under the statute.

The parties thus intended to proceed under the FAA, which under then-governing circuit law permitted them to contract for judicial review for legal and factual errors despite the statutory text to the contrary.

2. Numerous passages in the parties' arbitration agreement also strongly support the conclusion that the parties relied solely on the FAA to agree to arbitrate and for judicial entry of the award as a judgment.

For example, paragraph 14 of the "Rules For The Arbitration Between Hall Street Associates, LLC and Mattel Inc.," which was incorporated as part of the arbitration agreement, specifies that "the arbitrator shall have the power granted in 9 USC Sec. 7 to compel the attendance of witnesses duly notified by either party." Pet. App. 13a. This direct reference indicates that the parties were proceeding under the FAA and that the arbitration was not initiated under any other authority. *Cf.* 28 U.S.C. § 656 (provision of ADRA governing subpoenas for attendance of witnesses at court-referred arbitration); Fed. R. Civ. P. 53(c) (describing a special master's power to conduct evidentiary hearing).

The parties also used the language of Section 9 of the FAA to specify the "confirmation" procedure for the award. Section 9 states that a court must confirm an award, subject to Sections 10 and 11, "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," and it allows the parties to "specify the court." Paragraph 24 of the parties' arbitration agreement did just that by stating: "[t]he parties will submit the [arbitrator's] decision * * * to U.S. District Court for the District of Oregon (U.S. District Judge Robert E. Jones, presiding)" for "the confirmation of the decision as a judgment of such court." Pet. App. 17a.

In paragraph 27, the parties again relied on the terminology and structure used in Section 9. They provided that, upon application by either party, the district court "may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award." Pet. App. 16a.

Indeed, other than the specific grounds for vacatur, modification, or correction of the award, there is no material difference between the confirmation action established by Congress in Section 9 of the FAA and the one set forth in the parties' agreement. That the grounds for review vary does not demonstrate reliance on a source of authority other than the FAA because such variance reflected circuit law at that time, which held that the FAA "encourage[d]" provisions for expanded judicial review. *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 890 (9th Cir. 1997).

B. The Parties' Litigation Positions In The District Court Demonstrate Reliance On The FAA

Any doubt about whether the parties relied on the FAA as the authority for their arbitration agreement and judicial entry of the award, rather than some other source of authority, is laid to rest when one examines the arguments of the parties in proceedings before the district court.

Particularly revealing is a dispute that arose in February 2002 after the arbitrator's entry of the award. The arbitration agreement provided that any request for review of the arbitrator's decision must be filed "within 15 days of the arbitrator's ruling." Pet. App. 6a (¶3). The parties disagreed about whether petitioner's motion to vacate, modify,

and/or correct the liability award was timely because it had been filed more than 15 days after the liability award was entered, but within 15 days of the arbitrator's separate attorneys' fees award. Pet. App. 47a.

Respondent expressly relied on the FAA, noted its time limits, and then explained that the parties could have (and in this case had) bargained for shorter time limits, which was allowed under the FAA. *See* Dt. Ct. Dkt. 73 at 12-13; *see also* Pet. Br. 37 (cases allowing for waiver of affirmative defense of statute of limitations). In response, petitioner nowhere suggested that this was not an action under the FAA. Indeed, petitioner relied on FAA case law, specifying that FAA case law rather than cases involving the timeliness of challenges to collective-bargaining arbitration awards should govern because "[t]he FAA applies generally to commercial arbitration *and is specifically cited in the [parties'] Rules for the Arbitration at Paragraph 14*." Dt. Ct. Dkt. 77 at 7 (emphasis added). Petitioner went on in detail, further establishing that it relied on the FAA for its request for judicial review of purported errors of fact and law, and not other authority. *Ibid.* (discussing FAA's text and commenting on absence of cases under the FAA on the timing issue).

Petitioner's clear stance that the parties' agreement for judicial review was under the FAA was repeated in the district court in January 2003. The parties, who were again before the district court after the arbitrator had ruled in petitioner's favor on remand, disputed whether the district court should affirm the arbitrator's determination that petitioner was entitled to post-award interest. Dt. Ct. Dkt. 98 at 34. Petitioner expressly relied on the FAA again,

this time to argue that such interest was appropriate because Section 9 of the FAA contemplated a streamlined action for resolution of disputes about the validity of an arbitrators' award and thus any substantial delay should be compensated for by interest. *Ibid.*

It is thus abundantly clear that, in agreeing to arbitrate and to have the arbitration award reviewed by the district court, the parties relied exclusively on the authority of the FAA.

III. PETITIONER HAS WAIVED RELIANCE ON ANY AUTHORITY OUTSIDE THE FAA FOR ENFORCING THE PROVISION FOR JUDICIAL REVIEW FOR ERRORS OF LAW AND FACT

An examination of petitioner's arguments throughout the course of this litigation reveals that whatever sources of authority other than the FAA may exist, petitioner surely has waived reliance on them.

As discussed above, both parties relied on the FAA in agreeing to arbitrate in 2001 and to have a court review the arbitration award. The district court in its initial opinion, without any objection from petitioner, relied on the Ninth Circuit's decision in *LaPine v. Kyocera* as the authority for enforcing the parties' agreement to alter the grounds of judicial review under the FAA, rather than any other source of authority. Pet. App. 46a.

LaPine v. Kyocera was later overruled by the court of appeals' *en banc* ruling in August 2003 in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003). In that case, which was subject to Section 9, the Ninth Circuit held that "private parties lack the power to dictate a broad

standard of review when Congress has specifically prescribed a narrower standard" in the FAA. *Id.* at 1000.

Petitioner made a weak attempt to avoid the consequences of the new circuit precedent in its briefing before the Ninth Circuit when it argued for the first time that this action did not arise under the FAA after all. Pet. C.A. (No. 03-35525) Br. 27. Petitioner suggested that this arbitration was something different—a mere exercise of the district court's "case management" authority akin to the appointment of a special master. Pet. C.A. (No. 03-35525) Pet. for Reh'g 9-10. This argument bore no relationship whatsoever to any previous argument of petitioner and ran directly contrary to the various arguments it had already made.

In any event, petitioner abandoned even that position when it came to this Court. Petitioner made no mention in its petition for a writ of *certiorari* of a court's authority to appoint a special master nor any other case management authority of the district court that could have explained the proceeding below in this case. Of course, in light of petitioner's attempt in the court of appeals to argue that it was *not* relying on the FAA, its decision to base the *certiorari* plea on the contention that the FAA itself permits the parties to contract for "expanded judicial review," Pet. 12, could not have been anything other than a knowing strategy decision.

Nor did petitioner challenge the Ninth Circuit's holding that the grounds for judicial review were severable from the agreement to have the arbitration award enforced under the FAA. *See supra* note 3.

Petitioner's *certiorari* petition focused *only* on the scope of the FAA itself—specifically, whether the FAA prescribes default standards of review that can be varied by agreement or whether the FAA establishes the exclusive bases upon which a federal district court can vacate or modify an arbitration award issued after an arbitration proceeding under the FAA. Two paragraphs of the "Statutory Framework" section of the *certiorari* petition, Pet. 2-3, discuss the very statutory sections that petitioner now would be required to contend do not apply (9 U.S.C. §§ 9, 10, 11). And the petition expressly invokes the "body of federal substantive law of arbitrability" that the FAA creates. Pet. 3 (internal quotation marks and citation omitted). No other source of authority for enforcement of any aspect of the arbitration agreement or judicial review of the award is mentioned.

The *certiorari* petition also vigorously asserted that the decision below "directly conflicts" with the decisions of various other federal courts of appeals regarding whether the FAA permits district courts to review arbitration awards applying whatever standards the parties negotiated in the arbitration agreement. Pet. 12. In none of those cases was the arbitration agreement entered during the course of litigation. Thus, the very point that could have made this case unique was abandoned by petitioner in order to establish a ground for this Court's review. Indeed, the petition asserts that the FAA was intended to establish a "uniform federal substantive law of arbitration" and ominously describes the fractured decisions of the circuit courts. *Ibid.* Erasing all doubt that petitioner sought to present the instant case as anything other than the ideal vehicle for this Court to address "the current and

deepening split between the circuits on the validity of expanded judicial review *under the FAA*," the petition asserts that "[t]he widespread disagreement between the federal courts of appeals on an issue of such fundamental importance *under a federal statute* which has as its goal the creation of a uniform law of arbitration warrants review by this Court." *Ibid.* (emphasis added).

This was the thrust of petitioner's merits briefing and oral argument as well. Petitioner argued that the grounds in Sections 10 and 11 of the FAA were default provisions that could be varied by the parties to an arbitration agreement so that an award could be vacated or modified under the FAA on grounds not identified by Congress. *See, e.g.*, Pet. Br. 16, 18-20, 24-25, 38; Pet. Reply Br. 1-2, 6, 9; Oral Arg. Tr. 66 ("we are allowed to add to Section 10"). This was also the view of their *amici*. *See* Pacific Legal Foundation Br. as *Amicus Curiae* 2, 14; New England Legal Foundation, *et al.* Br. as *Amici Curiae* 8.

It was only in response to questions at oral argument before this Court that petitioner's counsel first appeared to suggest that the parties' judicial review provision might be enforced through some other, unidentified authority apart from the FAA. That assertion is far too late, too vague, too contrary to petitioner's prior positions throughout this litigation, and, in any event, is baseless, because as established above, no other source of legal authority (state or federal) applies.

CONCLUSION

For the reasons set forth above, and in respondent's earlier brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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